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William F. Swindler

William & Mary Law School

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THE CONSTITUTION AFTER WATERGATE†

WILLIAM F. SWINDLER*

I. "Recurrence to Fundamental Principles"

That no free government, nor the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue; [and] by frequent recurrence to fundamental principles....

The constitutional crisis of 1973-1974 generated many issues, some political and others judicial, some more or less disposed of by events, and others left unanswered, possibly forever. What is perhaps more important are the jurisprudential questions which also emerged from the welter of facts-stranger-than-fiction: the uses of governmental power and the standards for restraints upon the power or its uses. These questions in turn directed attention to basic theory in which American constitutional practice presumably has its roots. Counsel for congressional committees, for judicial agencies such as grand juries, and for the executive branch all drafted elaborate arguments for the construction and application of original theory and subsequent legal history. Now that the era of crisis is presumably receding, two opportunities emerge: (1) the chance to review,

† Based on an enrichment lecture delivered at the College of Law, University of Oklahoma, November 8, 1974.


1 Va. Const. (Declaration of Rights), I, § 15.

in the perspective of the Watergate tragedy, the theories or fundamental principles on which the American constitutional system bases its claim to legitimacy, and (2) the chance to evaluate the effects of legislative and judicial events of 1973-1974 upon that system.

Separation of Powers: The Basic Theory

In the course of recent events, a dictum of one of the Founding Fathers—James Madison—emerged as a fundamental principle: Separation of powers, Madison maintained, in practice was a check-and-balance system of interdependence; "unless these [separate] departments be so far connected and blended, as to give each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained." The Constitutional Convention of 1787, and most of the state conventions antecedent to it, had been committed to a theory of government articulated by Montesquieu which eschewed concentration of several functions of government within one person or office.

At the same time, Madison acknowledged that separate powers are not in all circumstances equal; each department, in the nature of things, tends to accumulate more power to itself, he observed, and of the three the legislative department has a unique advantage:

Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments. . . . Nor is this all: As the legislative department alone has access to the pockets of the people, and has in some Constitutions full discretion, and in all, a prevailing influence over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

If national experience has tempered some of Madison's generalities, the fact remains that congressional surveillance of at least the executive branch of government was intended as a check upon that branch. The Senate Select (Watergate) Committee on Presidential Campaign Activities noted in its Final Report the continuing responsibility of "acquainting itself with the acts and the disposition of the administrative agents of the

3 The Federalist, No. 48 (Cooke ed. 1961) (A. Hamilton).
5 Montesquieu, De l' Esprit des Lois (Truc ed. 1961).
government” which was vested in Congress, “to oversee the administration of executive agencies . . . and to inform the public of any wrongdoing or abuses it uncovers.” Although the supervisory function of the legislative branch was exercised without executive branch resistance in the early days of national history, the requirements for a more independent executive and the personality of men like Andrew Jackson in the presidency soon interposed bounds to congressional initiative in this area.

“Having separated the three great departments by a broad line from each other,” wrote Joseph Story in 1833, “the difficult task remains to provide some practical means for the security of each against the meditated or occasional invasions of the others.” While the judicial branch, in Story’s view and later in the view of Chief Justice Taney, was not an appropriate medium for enforcing such security, the Court in the following century did in fact set up certain guidelines and limits. Where no legislative purpose was apparent, or where the congressional inquiry related to matters in litigation, the Court defined the authority narrowly, vis-à-vis the investigators; where allegations of malfeasance in executive offices were the basis of the inquiry, the Court was disposed to treat the investigative authority broadly. The Watergate Committee defined its functions in terms of the standards set out in the latter group of cases, and concluded that its primary public responsibility was to interpret its own mandate broadly so that both Congress and the American people would be reminded that the basic objective of checks and balances cannot be attained without “steadfast vigilance of the conduct of the public officials they choose to lead them.”

Powers, Privileges, and Prerogatives

Much confusion was generated in the Watergate crisis from the fact that the executive power is stated only in general terms in Article II of the

8 Cf. 10 Annals of Cong. 786f (1800).
14 Final Report (Watergate), at xxiv.
15 Id. at xxv.
Constitution itself, while the truth is that executive independence has broadened under the influence of aggressive holders of the presidential office. For Thomas Jefferson, any exercise of power by the executive which was not spelled out in Article II was questionable, at least until ratified by Congress. But Andrew Jackson did not hesitate to challenge Congress by unilateral action in the matter of the Second Bank of the United States, while Theodore Roosevelt found his authority for action in "what was imperatively necessary for the Nation" where no specific constitutional bar could be cited. Thus, in a century's span, the executive view of its own power went from one extreme to another, with little disposition on the part of Congress to challenge the process.

Not only was this attribute of executive independence derived from inferences concerning the nature of the office, but it came to be defined by a term—"executive privilege." The term "privilege" appears in the Constitution in another context, or pair of contexts. Both of these usages are distinguishable from the Article II context which both President Nixon and his adversaries read into the latter. Article I, Section 6 refers to privileges of congressmen amounting to limited immunities from arrest, while Article IV, Section 2 speaks of "privileges and immunities of citizens of the United States," a concept even further removed from the type of "privilege" being read into Article II.

What is really meant, at least in part, vis-à-vis the executive's independence of initiative, is what in British constitutional usage is called prerogative, or the residual authority of the sovereign (i.e., executive) subject to Parliamentary curtailment. Lord Coke's statement—"the King hath no prerogative but that which the law of the land allows him"—defines the nature and limit of independent executive power in Britain. While the fundamental difference between the American and British constitutional process is the absence of a separation of powers principle in the latter, the fact is that the absence of a specific provision for privilege/prerogative in Article II of the United States Constitution, considered together with the Founding Fathers' assumption of legislative supremacy in

17 Cf. M. James, Portrait of a President (1936).
20 U.S. Const., art. IV, § 2.
the Parliamentary tradition, points to a narrow scope for the independent initiative of the President, even when its existence may be assumed.

The question of presidential power has assumed its primary importance in the twentieth century—i.e., in the period of increasing need to rely on a central and promptly responsive authority in a world of rapidly appearing challenges. The demand for executive initiative was generated by the pressures of economic emergency in the depression decade of the 1930's, and led Franklin D. Roosevelt to a great expansion of the use of the executive order on the domestic scene, while executive agreements on the foreign scene were vastly accelerated by the necessities of World War II and particularly by the postwar continuance of emergency powers as duly sustained by the courts.

The centralized federal executive contrasts sharply with the prevailing principle of the "divided executive" in most state constitutional systems, so that judicial construction of the state executive article is hardly enlightening on this particular question, aside from explaining Alexander Hamilton's reassurance that the restrictions upon the federal executive purposely were made stronger than those laid upon state governors. Conversely, Story conceded the necessity of "incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions which are confided to it," while Marshall found Article II vesting in the President "certain important political powers, in the exercise of which he is to use his own discretion."

With the growth of the administrative process into a virtually autonomous branch of the executive, the need to review the legitimacy of administrative authority eventually led the courts to pronouncement of the "intelligible standard" doctrine of agency in government. No comparable doctrine of general applicability to the executive branch itself has been suggested, so that in 1973 both legislative and judicial branches groped for a means to reconcile, and apply, a principle of accountability to executive privilege. Who is to define matters of national interest or

security, and who is to limit executive privilege to this definition? What form is accountability to take, and to which branch of government does it run with respect to the President—to the judicial only, to the legislative only, or to both? What are the criteria for evaluating executive behavior, and what are the options in the event that the evaluation is negative and condemnatory?

Reviewability: The Judicial Check. Article II unequivocally states: "The executive Power shall be vested in a President of the United States of America." In terms of governmental structure, this was a major departure from the Articles of Confederation, creating a separate branch which had not existed under the Confederation and—what is more important—making this office independent of Congress, the incumbent being elected by a separate, elite group. The fact that the Electoral College never functioned in the manner originally envisioned did not affect the independence of the executive from the legislative branch, except in the case of "advice and consent" of the Senate in matters of presidential appointments and treaty making.

Nevertheless, as Justice Robert H. Jackson has observed, there is a poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.

Hamilton, on the other hand, saw the executive power as defined by the nature of the function:

The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. . . . The general doctrine of our Constitution then is, that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications, which are expressed in the instrument.

Madison criticized this broad inference of executive power with the comment that "the most penetrating jurist would be unable to scan the extent of constructive prerogative."
The ambivalent and occasionally contradictory approach to the subject of independent executive initiative is strikingly illustrated in the conclusions of William Howard Taft at the beginning and end of a 10-year period, 1916-1926. At the beginning, taking an academic view of the office he had recently held, Taft wrote:

The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. . . . There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.

Whether this statement was prompted by the continued assertions of his erstwhile colleague and subsequent Bull Moose third-term candidate, Theodore Roosevelt, circumstances at the end led Taft as Chief Justice to declare:

In the absence of any specific provision to the contrary, the power of appointment to executive office carries with it, as a necessary incident, the power of removal. . . . It could never have been intended to leave the Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it.

The majority opinion in Myers v. United States thus gave substantial judicial support to the Hamiltonian thesis of inherent executive power, but within the decade, the Court, under Chief Justice Charles Evans Hughes, specifically limited the particular power with which Myers was concerned—the right of the President to remove an officer whose appointment had been subject to “advice and consent” without a similar check upon the act of removal. Humphrey’s Executor v. United States was followed the next year by United States v. Curtiss-Wright Export Corp., in which the Court sought to distinguish between maximum independence of executive initiative in the area of foreign affairs, and minimum independence in the area of domestic affairs. Justice George Sutherland, speaking for the Court, contended that in the latter area, the power of the national government derived from powers carved from those of the states, while in the former area, it descended upon the United States from the sover-

36 W. Taft, Our Chief Magistrate and His Powers, 139-40 (1916).
37 Cf. T. Roosevelt, supra note 18.
38 Myers v. United States, 222 U.S. 52 (1926).
39 Id. at 126.
eighty of Great Britain to which, as a national government, it succeeded.\textsuperscript{42} Although both of Sutherland's premises may be challenged,\textsuperscript{43} for the most part, his doctrine of executive latitude in the area of foreign affairs has remained the basic rule.\textsuperscript{44}

The concept of an inherent power of independent discretionary action by the executive, in the area of domestic affairs, has been increasingly subjected to judicial circumscription. In 1952, in the \textit{Steel Seizure Case},\textsuperscript{46} a widely divided Court declared, in an opinion read by Justice Hugo Black, that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker,"\textsuperscript{46} and requires rather that his actions be subject to legislative guidelines. Justice Jackson's concurring opinion stated: "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. . . . Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress."\textsuperscript{47} Jackson sought to illustrate this last statement by an oft-quoted distinction:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . .\textsuperscript{48}

Twenty years later, the Court spoke with a more nearly unanimous voice in \textit{United States v. United States District Court},\textsuperscript{49} in declaring unconstitutional a claim of discretionary presidential power to authorize electronic surveillance in domestic security cases without warrant. Justice

\textsuperscript{42} Id. at 315-16.
\textsuperscript{43} Levitan, \textit{The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory}, 55 \textit{Yale L.J.} 467 (1946).
\textsuperscript{44} Cf. Wiener v. United States, 357 U.S. 349 (1968).
\textsuperscript{45} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 519 (1952).
\textsuperscript{46} Id. at 587.
\textsuperscript{47} Id. at 635.
\textsuperscript{48} Id. at 635-36.
\textsuperscript{49} United States v. United States District Court, 407 U.S. 297 (1972).
Lewis Powell for the Court held that first amendment and fourth amendment safeguards refuted a claim of executive discretion: "The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'" In 1971, the Court of Appeals for the District of Columbia observed that no officer of the executive branch could properly be considered as the sole and final judge of the scope of his own discretionary power, and two years later, the Supreme Court found itself unable to take jurisdiction in matters of executive discretion where Congress had expressly waived any legislative conditions for the exercise of executive power. Because the case turned upon the executive secrecy provision of the Freedom of Information Act, the majority opinion pointed out, it was entirely within the power of Congress to amend the statute and dispose of the jurisdictional bar.

Review of executive power in terms of legislative limits and conditions has thus been asserted by the judiciary in a line of decisions which extended consistently from 1926 to the eve of Watergate. What remained to be settled—as it was settled, to a degree, in several judicial tests in the course of Watergate—was the question of direct review of executive action on the issue of inherent powers in the presidential office.

Accountability: The Legislative Check. Direct review of executive action by the legislative branch has not been considered compatible with the separation of powers theory, and one of the more abrasive disputes between Congress and the White House in the course of the Watergate affair was the contention that executive privilege and/or executive immunity could be asserted by the President at his option in matters of appearance and testimony by witnesses from the executive department. Certainly it is not possible to claim a constitutional obligation to comply with such requests in the manner of British constitutional practice, where—there being no separation of powers doctrine in the American sense—members of the executive branch (the "Government" under the incumbent Prime Minister) are members of the sitting Parliament and, hence, directly subject to its discipline and jurisdiction.

For this same reason, it is not practical to consider authorizing a congressional vote of "no confidence" in the Parliamentary sense, even by amending the Constitution for such a purpose, if anything is to be pre-

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60 Id. at 321.
64 410 U.S. 73, 93 (1973).
66 O. Hood Phillips, supra note 22, at ch. 8, 15.
served of the separation of powers doctrine. The use of the investigatory power of Congress, as in the case of the Select Committee, is the most apparent practical medium for legislative oversight of executive/administrative action, and in its Final Report, the Select Committee recommended a strengthening of the process to this end: more specific authority in the courts to enforce committee subpoenas, creation of an Office of Congressional Legal Services, and broader authority in committees to compel testimony of witnesses.

While frequent references were made, in the course of Watergate and related investigations, to instances of compliance or noncompliance by executive officers with congressional requests for testimony or documents, the subsequent appearance of President Gerald R. Ford before the House Committee on the Judiciary to explain his reasons for pardoning former President Nixon may prove to be a clearer precedent for the future. If so, it may make more practical the accountability process itself. Few examples of analogous proceedings are to be found; the congressional inquiries of the Harding administration never involved the highest echelons of the executive office, even though Cabinet officers were affected, and impeachment investigations of executive department officers offer little in the way of procedural guidelines.

Judicial recognition of the investigative power of Congress, generally speaking, has been unequivocal; "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function," wrote Justice Van Devanter for a unanimous Court in 1927. "Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed." In 1957, although he warned that the congressional power could not be used merely for fishing expeditions, Chief Justice Warren affirmed the broad scope of investigatory authority used properly for fact-finding for legislative purposes.

The power . . . is inherent in the legislative process. . . . It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social,
economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal government to expose corruption, inefficiency or waste.\textsuperscript{63}

With this categorical affirmation of the inherent power of the legislative department to hold all other branches of government to account, Congress was presumably equipped with proper authority to demand information in the Watergate affair. What still remained unanswered, as became evident in the course of the involvement of all three branches of government, was the question of inherent powers of the executive and the circumstances under which these might require restraint or denial of either review or accountability.

II. Moral or Pyrrhic Victory?

After the battle of Asculum, the Greek conqueror Pyrrhus is said to have declared, "Another victory such as this, and I am lost." In juxtaposition might be placed the observation of Alice in Wonderland: "Everything has a moral, if one only knew what it was." Within these admonitory frames of reference, the practical consequences of Watergate as a constitutional crisis may be assessed. The legislative process which began with the Senate Select Committee and climaxed in the report on impeachment recommendations by the House Judiciary Committee; the judicial role which began with Judge John Sirica's professional suspicion of the readiness of the apprehended Watergate burglars to plead guilty and led to fundamental conflicts within the executive department, with the special prosecutor under the Attorney General seeking to compel the Chief Executive to comply with demands for evidence; the unanticipated uses to which the twenty-fifth amendment of the Constitution was put in the Agnew and Nixon resignations and the Ford and Rockefeller appointments—these cataclysmic impacts upon the American constitutional system, occurring in the vortex of a world economic crisis, will require substantial time for evaluation and final judgment. One thing, at least, is clear—Watergate left a permanent mark upon all three of the separate powers of government; but, like Alice, we do not yet fully understand what it may have been.

III. The Effect of the Congressional Inquiries

The Senate Select Committee

On February 3, 1973, Senator Sam Ervin introduced the resolution creating the Select Committee "to conduct an investigation and study of the

extent, if any, to which illegal, improper, or unethical activities were engaged in by any persons, acting individually or in combination with others, in the presidential election of 1972, or any campaign, canvass, or other activity related to it.\footnote{64} On November 2, 1973, Senator Ervin, now in his capacity of chairman of this committee, sought and obtained from Congress endorsement of its use of subpoena powers as against the President himself as "a person whose activities the Select Committee is authorized . . . to investigate," (2) approval of the Committee's action in seeking judicial enforcement of its subpoenas, and (3) formal declaration that both of these steps were essential to "the furtherance of valid legislative purposes, to wit, a determination of the need for the scope of corrective legislation . . . and, in that connection, the informing of the public of the extent of illegal, improper, or unethical activities that occurred. . . \footnote{65}

While the effort to secure judicial enforcement of the Committee's subpoenas was not pursued to a final decision,\footnote{66} primarily because of the rapid development of other events, both in the courts and in the House Committee on the Judiciary, the scope of authority vested in the Select Committee may be assumed to have been confirmed by these other events in the courts themselves, corroborating prior judicial pronouncements.\footnote{67}

There remain the findings and recommendations of the Select Committee itself, addressed to specific abuses uncovered in the many volumes of testimony throughout the Committee's existence. These may best be evaluated by recapitulating the formal recommendations made in the Final Report, together with a commentary on the state of legislation to the present, in prospective implementation thereof. If congressional response has not been swift, it must in fairness be noted—as the former President frequently noted—that the prolonged concern with Watergate had diverted congressional attention from many pressing national and international issues which, once the immediate crisis was past, could no longer be subordinated. The recommendations of the Select Committee, for the present at least, will serve to define the vulnerable stress points in our governmental system.

1. The Watergate Break-in and Cover-up

Committee recommendations: 1. Creation of an Office of Public At-
torney. 2. Revision of the Federal Criminal Code to make a separate felony of conspiratorial interference with political nominating and election processes. 3. Prohibition of White House activities relating to national and domestic security except as explicitly authorized by Congress. 4. More comprehensive and frequent congressional examinations of the activities of the existing intelligence and law enforcement agencies. 5. Amendment and strengthening of criminal laws on perjury in testimony before congressional committees. 6. Reconsideration of proposals to broaden defenses to "mistake of law" allegations. 7. Review of provisions in the Omnibus Crime and Safe Streets Act of 1968 relating to electronic surveillance.

Of these seven recommendations—presumably in order of importance—the first, concerning creation of a new Office of Public Attorney, is the most innovative. As the Committee's black-letter proposal puts it, this officer

...would have jurisdiction to prosecute criminal cases in which there is a real or apparent conflict of interest within the executive branch. The Public Attorney would also have jurisdiction to inquire into (with power to gain access to executive records) the status and progress of complaints and criminal charges concerning matters pending in or involving the conduct of Federal departments and regulatory agencies.

In commenting on this recommendation, the Committee's Final Report stated:

The Public Attorney we recommend would not only be a "special prosecutor" but an ombudsman having power to inquire into the administration of justice in the executive branch. With the power of access to executive records, he could appropriately respond to complaints from the public, the Congress, the courts and other public and private institutions. If he became aware of misconduct in the executive branch, he could assume the role of special prosecutor. The Public Attorney should also be required to make periodic reports to Congress on the affairs of his office and the need for new legislation within his jurisdiction, a function which should be of great assistance to the relevant congressional oversight committees.

The Committee concluded that such an office could be created without substantial change in existing statutes. It recommended that by amending the current immunity statute, "use" immunity could be granted by the independent prosecutor without requiring that he secure the consent of

69 Final Report (Watergate), at 96-106.  
70 Id. at 96.  
71 Id. at 96-97.  
the Attorney General, and that power of judicial appointment could readily be found in the constitutional provision that "Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." 

As for other recommendations, a variety of proposals were dropped into the Senate hopper in the closing weeks of the Ninety-Third Congress, the most significant being Senator Ervin's omnibus S. 4227, "to implement certain reforms . . . recommended by the Senate Select Committee. . . ." This bill would be cited, if enacted into law, as the "Watergate Reorganization and Reform Act of 1974." In effect, it would supersede a series of proposals introduced over the 12-month period from December 1973 through December 1974, viz.:

S. 2803 (December 12, 1973), to insure the separation of constitutional powers by establishing the Department of Justice as an independent establishment of the United States.

S. 2978 (February 7, 1974), to establish a special commission to study the establishment of an independent permanent mechanism for the investigation and prosecution of official misconduct and other offenses committed by high Government officials.

S. 3652 (June 17, 1974), to insure the separation of constitutional powers and to insure the administration of justice with respect to the commission of crimes by officers and employees of the executive branch of the Federal Government, and with respect to Federal elections, to remove enforcement responsibilities in such cases from individuals with actual or apparent conflicts of interest, and to establish an independent Public Prosecutor.

S. 4010 (September 17, 1974), to establish an independent Public Attorney to further insure the separation of constitutional powers and the administration of justice.

S.J. Res. 246 (September 30, 1974), authorizing the Office of Watergate Special Prosecution Force to investigate and report on White House crimes and conferring power to compel testimony and subpoena relevant tapes and documents.

Among the foregoing, S. 2803, S. 3652, and S. 4010 were products of Senator Ervin's subcommittee on separation of powers, which was established in 1967 and has accounted for a number of publications, including hearings

73 U.S. Const., art. II, § 2, cl. 2.
74 This bill was introduced Dec. 12, 1974. To date it has not been scheduled for public hearings.
and reports, on separation of powers, procedures for a federal constitutional convention,\textsuperscript{76} congressional oversight of administrative agencies and—two years before Watergate began—a 635-page study of executive privilege.\textsuperscript{77}

Changes within the Federal Criminal Code which may reflect Watergate-related reforms have of necessity been merged into the continuing study of a comprehensive revision of the Code itself.\textsuperscript{78} Other recommendations in the Select Committee's Final Report, many of which are impliedly to be implemented in S. 4227, may be succinctly summarized as follows.

2. \textit{Campaign Practices}

Recommendations: 1. Legislation making criminal the employment of persons in election campaigns for sabotage or obstruction of the efforts of opponents. 2. More stringent definition of election law violations. 3. New laws to strengthen laws against unauthorized taking of records or papers privately held by political opponents. 4. Stricter criminal liability for impersonating candidates for political office.\textsuperscript{79}

The Federal Election Campaign Act Amendments of 1974\textsuperscript{80} were launched as a Senate bill\textsuperscript{81} and reported out\textsuperscript{82} considerably before the Select Committee had concluded its primary work, and certainly some time before its Final Report was prepared. Accordingly, the draftsmen had only the benefit of the piecemeal hearings of the Watergate investigation\textsuperscript{83} and only took into account such specific recommendations of the Final Report as had become manifest by the time Public Law 93-443 was enacted. Except as other recommendations have been reflected in S. 4227, therefore—and when and as the latter becomes law—the campaign reforms defined

\textsuperscript{76} The efforts in the late 1960's to petition Congress to call the first general constitutional convention since 1787 is critically analyzed in Swindler, \textit{The Current Challenge to Federalism: The Confederating Proposals}, 52 Geo. L.J. 1 (Fall, 1963). This movement was essentially an attack on Supreme Court malapportionment holdings. \textit{Cf.} Baker v. Carr, 369 U.S. 186 (1962) and would have affected another aspect of separation of powers in constitutional theory, i.e., state-federal powers.


\textsuperscript{78} \textit{Cf.} Continuing series of hearings before Senate Subcomm. on Criminal Laws and Procedures, 93d Cong., 2nd Sess. (1974).

\textsuperscript{79} \textit{Final Report (Watergate)}, at 211-14.


\textsuperscript{81} S. 3044, 93d Cong., 2d Sess. (1974).


\textsuperscript{83} More than two dozen volumes of Watergate hearings were ultimately published by the Ervin Committee, including an appendix in two parts, separately titled, \textit{Legal Documents Relating to the Select Committee Hearings}, 93d Cong., 2d Sess. (1974).
in the Final Report do not reflect any concerted congressional interest in implementing legislation.

3. Incumbency Practices

Recommendations: 1. Illegal uses of government resources by incumbents to perpetuate their own tenure to be the particular concern of the Public Attorney. 2. A Federal Elections Commission to gather information on these practices to be furnished to the Public Attorney. 3. Stricter criminal liability for violating election laws in this manner. 4. Upgrading to the status of a felony of the offense out in 18 U.S.C. 595 (political use of federal grants). 5. Strengthening of provisions in 18 U.S.C. 611 and 18 U.S.C. 602 concerning kickbacks by government contractors. 6. Enlargement of the Hatch Act\(^4\) to include more government employees and particularly the Attorney General who must enforce the law. 7. Greater congressional oversight of election practices.\(^8\)

4. Campaign Financing

Recommendations: 1. A nonpartisan Federal Election Commission to replace the present election certifying triumvirate of the Clerk of the House, Secretary of the Senate, and Office of Federal Elections of the General Accounting Office. 2. Legal limit of $100 in individual cash contributions to election campaigns. 3. Legal requirement that a candidate for presidential office designate a single committee of his political group to manage campaign funds. 4. Statutory maximum for campaign expenditures. 5. A related law limiting the time in which campaign contributions may be made and reported. 6. Liberalized tax credits for campaign contributions properly made and reported. 7. Negative action on public financing of campaigns. 8. Prohibition of contributions from foreign nationals. 9. Prohibition of campaign fund solicitation by former government employees (e.g., obviously, former Attorney General John Mitchell) for a period of one year after termination of such employment. 10. Limitations on contributions by organizations of various types in election campaigns. 11. Making a felony of such contributions by individuals.\(^8\)

From the two preceding groups of recommendations, it is evident that the Final Report was devolving into a conglomer of collateral matters which have sporadically surfaced in discussions of improved election practices. Recommendation No. 10 obviously related to the famous "Milk Fund,"

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\(^4\) 53 Stat. 1147.
\(^8\) Final Report (Watergate), at 442-44.
\(^8\) Id. at 564-77.
which was scrutinized in detail in Chapter 5 of the Report, while Chapters 6, 7, and 8 reported, without specific recommendations, on the Committee's findings in the campaigns of Hubert Humphrey and Wilbur Mills and on the Hughes-Rebozo investigation.\textsuperscript{87} So far as the Committee recommendations from Chapters 3 to the end of the Final Report are concerned, they appear to rest upon the fortunes of S. 4227. And in summary, the committee itself observed:

The improper and unethical activities that occurred . . . will not be eliminated merely by new legislation. Although law seeks both to shape and reflect the moral and ethical values of individuals, new laws cannot fully substitute for such individual values. Therefore the political process and government itself must attract individuals of the highest moral and ethical standards if the improper activities that occurred in the 1972 Presidential campaign are to be eliminated completely in the future.\textsuperscript{88}

The House Judiciary Committee

The preceding quotation from the Ervin Committee Report is particularly relevant to the final report of the House Judiciary Committee on presidential impeachment. The resignation of Mr. Nixon presumably rendered the impeachment proceedings academic or moot. Despite some statements to the contrary,\textsuperscript{89} the political realities certainly confirmed this, and the presidential pardon, discussed infra,\textsuperscript{90} settled the matter. What remains, then, in the Committee's Report, is a recapitulation of executive practices which are constitutionally suspect—guidelines for circumspect behavior in the future.

By the time the House committee had been directed by the full chamber to consider the substance behind a series of impeachment resolutions,\textsuperscript{91} the Committee had already published the first of a series of studies which became best sellers of sorts, and these continued into June of 1974.\textsuperscript{92} Already, on February 6, 1974, the House had adopted another resolution directing the Committee to make its own determination of the evidence and report out articles of impeachment if it deemed proper.\textsuperscript{93} By August

\textsuperscript{87} Id. at 579-1078.
\textsuperscript{88} Id. at 213.
\textsuperscript{90} Cf. notes 119, 124 infra.
20, 1974, when the Committee had submitted its Final Report, the action was anticlimactic; not only had live television carried to millions of Americans the full debate and vote on the articles of impeachment, but Mr. Nixon had resigned. There remained a record of what the Committee, ultimately unanimously, and the House, by what was prospectively an overwhelming majority, had it come to a vote, considered impeachable conduct. This record remains as the caveat for executive behavior:

The first article of impeachment concerned the Watergate break-in and cover-up, and the specific presidential conduct set out therein was that Mr. Nixon, "using the powers of his high office, engaged personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede and obstruct the investigation of such unlawful entry; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities." Such conduct, the Committee concluded, violated "the confidence of the nation" in the integrity of the presidential office and constituted the type of action described as "high crimes and misdemeanors" in the impeachment clause of the Constitution.

Article II concerned itself with violation of the constitutional rights of American citizens, through improper use of government agencies and the information they could gather concerning specific individuals (i.e., the Ellsberg affair), and Article III related to executive defiance of legislative demands for records. While only the first of the three articles ultimately won total Committee support, the fact remains that this article epitomizes the standards of constitutional conduct which now become a matter of record. To the extent that legislative action (rather than legislation) can spell out some of the criteria for executive responsibility which have never been found in the precise language of Article II of the Constitution, the impeachment article of August 20, 1974, has become a historic gloss upon the text.

IV. The Uses of Court-Related Processes

The Special Prosecutor

As the Ervin bill (S. 4227) suggests, the ad hoc approach of the Watergate prosecution had unavoidable anomalies: Essentially, the question which remained unanswered throughout the 1973-1974 crisis was how

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85 Id. at 2.
86 Id. at 3, 4.
the objectivity, independence, and integrity of the prosecuting process could be assured when the executive branch in effect was investigating itself.97

As the Select Committee observed in its Final Report, its own recourse to judicial action occurred in more than 60 instances, including applications for limited or "use" immunity in the case of 29 separate witnesses, and four appearances as *amicus curiae* in actions brought by the Special Prosecutor.98 This presents a related and equally fundamental question of the practical scope of congressional responsibility to pursue its investigations to active criminal litigation.99 Thus, the Final Report undertook to resolve the status of the Special Prosecutor by its recommendation of a new office of Public Attorney,100 and the role of Congress in criminal proceedings by its recommended support of a bill already introduced101 which would establish a Congressional Legal Service to be the legislature's "permanent litigation arm."

The Special Prosecutor throughout the Watergate crisis was never completely cleared of his potentially compromising status. With little legal or political precedent for his work,102 he relied ultimately upon public opinion and Congress' moral support to make effective his independence of the executive branch of which he was a part. The courts continually treated him as their officer, despite a lack of any statutory basis for this policy, and the Prosecutor himself periodically had to petition the courts to stay legislative as well as executive action.103

The Final Report recognizes that the improvisations of the Watergate Special Prosecutor demand something more definite and certain for the future. There is, accordingly, much merit in the Ervin bill's proposal to create "as an independent establishment of the Government the Office of the Public Attorney," the occupant to be nominated by three retired federal appellate judges designated for this purpose by the Chief Justice.104 It is, moreover, only realistic to assume that in the complex and often anonymous administration of large-scale modern government, there will

98 Final Report (Watergate), at 1079.
99 Id. at 1080.
104 Id.
be continuing opportunity for such an officer to "investigate and prosecute (1) allegations of corruption in the administration of the laws by the executive branch of the Government; (2) cases referred by the Attorney General because of actual or potential conflicts of interest; (3) criminal cases referred to him by the [proposed] Federal Election Commission; and (4) allegations of violations of Federal laws relating to campaigns and elections for elective office."

The Tapes Subpoenas

In the two principal constitutional cases growing out of Watergate, it became established that no executive/administrative officer, up to and including the Chief Executive, can be the sole judge of the nature and extent of his own discretionary power. That has now been asserted as the function of the judiciary; whether there is an identifiable role for the legislative branch in this area is still an unsettled question—and the Final Report was at pains to criticize the judicial expressions of doubt in the matter.

In the first of the major cases, concerning the grand jury effort to secure White House tapes in the summer of 1973, the Court of Appeals for the District of Columbia made clear that "even the Chief Executive is subject to the mandate of the law when he has no valid claim to privilege," that privilege, as synonymous with discretionary power, does not mean that "an act is discretionary merely because the President is the actor," and that where privilege (or prerogative) exists, it may yet be subject to judicially determined limitations.

In the second case, the Supreme Court reiterated the principle of the 1973 intermediate court holding:

... neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances....

105 Id.
109 Final Report (Watergate), at 1081-1082.
111 Id. at 712.
112 Id. at 713.
We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.  

From the two cases, taken together in the context of the constitutional crisis of 1973-1974, it now seems established that subpoenas in the case of formal criminal proceedings may be enforced as against any officer of the executive branch. To vest in the legislative branch an equally strong subpoena power, the Select Committee's Final Report recommended:

The Committee recommends that Congress enact legislation giving the United States District Court for the District of Columbia jurisdiction over suits to enforce congressional subpoenas issued to members of the executive branch, including the President. This statute, which would apply to all subpoenas issued by congressional bodies, would replace the special statute passed for and limited to the Select Committee. ... The statute should provide that a congressional body has standing to sue in its own name and in the name of the United States and may employ counsel of its own choice in such a suit. The statute should provide that suits brought to enforce congressional subpoenas must be handled on an expedited basis by the courts.

Whether the vesting of such power in two branches of government as against the third offers a practical threat to separation of powers as the operating principle of the American constitutional system is a question which requires thorough exploration by Congress—e.g., in the jurisdictional provisions in Title III of S. 4227—and if enacted, may well require definition by judicial construction. The record of Congress since Watergate, in demanding a succession of disclosures by executive agencies such as the Central Intelligence Agency, suggests that the legislative branch, no more than the executive, ought not become the sole and final judge of its own discretionary powers.

The Presidential Pardon

Perhaps the most spectacular aftermath of the Nixon resignation and

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114 Id. at 713.
115 Final Report (Watergate), at 1084.
116 The Watergate Reorganization and Reform Act of 1974, proposed in S. 4227, would add a new Chapter 85 to 28 U.S.C., granting jurisdiction over certain civil actions. It would concern perjury before congressional committees and behavior of witnesses before special committees.
the Watergate crisis was the pardon of the former President by his successor on September 8, 1974. While there was only momentary question, expressed by a few, concerning Mr. Ford's constitutional authority in the matter, the policy and politics of the action evoked more substantial questions. When Mr. Ford, in a press conference, conceded that acceptance of the pardon in his view amounted to admission of guilt, the subcommittee on criminal justice of the House Judiciary Committee invited the new President to appear before it and explain his reasons for the action. Thus, in a final innovation in American constitutional history, the executive acquiesced in a legislative request which fundamentally affected the judicial process vis-à-vis a President removed (by his own resignation) from office who was constitutionally "liable and subject to Indictment, Trial, Judgment and Punishment according to Law."2

In his statement to the subcommittee, President Ford quoted Hamilton in The Federalist ("a well-timed offer of pardon . . . may restore the tranquillity of the commonwealth"), Chief Justice John Marshall ("an act of grace . . . which exempts the individual . . . from the punishment the law inflicts for a crime he has committed"), and the modern Court ("the determination by the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed"). Beyond that, Mr. Ford conceded that in the final conversations preceding the Nixon resignation, "references to a possible pardon" were incidentally made, but that "there never was at any time any agreement whatsoever concerning a pardon."24

Presidential pardons are seldom newsworthy because they usually are routine acts following comprehensive administrative study of generally technical issues. Of several hundred pardons granted by each President in the course of a four-year term, the Department of Justice makes no special effort to develop statistical interpretations of trends. As for the

120 U.S. Const., art. I, § 3, cl. 7.
124 Nixon Pardon, at 93, 94, 96.
126 Id., ch. 1.
pardon of former President Nixon, like so much in the Watergate crisis, the magnitude of the issues has made orthodox criminal process almost irrelevant. The ultimate good of the common weal, it may be suggested, has been best served by uncovering as much of the truth as possible. Whether pardons, "use" immunity, suspended sentences, or release after short imprisonment have in fact uncovered as much of the truth as possible, will remain a question for historians to debate.

V. The Constitutional Future

The Twenty-Fifth Amendment and Its Unanticipated Uses

Among the landmark documents of the Watergate crisis—the Select Committee's Final Report, the final impeachment report of the House Judiciary Committee, Nixon v. Sirica, and United States v. Nixon—the twenty-fifth amendment to the Constitution may prove to be the most significant. That amendment was ratified with one purpose uppermost—the preservation of executive succession in circumstances similar to those of President Kennedy's assassination and President Johnson's known history of heart attack. But its language was broader and more general, and in the context of Watergate it proved more significant as a factor facilitating the governing process than its original sponsors had ever anticipated.

Beyond that, the amendment may offer remedies for future crises if it is implemented by appropriate legislation. The resignation of former Vice President Spiro T. Agnew, the appointment of Gerald Ford, and his appointment of his own successor upon his advancement to the Presidency, provoked a certain decrying of a procedure which has given the nation its first unelected President and Vice President. In reply one may suggest, first, that the people of the United States acquiesced in that situation when they ratified the amendment, and, second, that the result is not much different from what it would have been had the idea of an Electoral College ever worked as the Founding Fathers assumed that it would.

There have been various proposals to modify the procedure after the Agnew-Ford-Nixon-Ford-Rockefeller "domino" experience. Representative Henry Reuss of Wisconsin offered a "no confidence" amendment which, if passed, would have required that in the event of a "no confidence" vote by a stipulated majority of both houses of Congress, both the execu-

tive and legislative branches would stand for a new election. This proposal would require almost a total reorientation of American governmental principles in favor of the British system of parliamentary government. Its chief virtue is its attempt to preserve electoral control over both political branches of government. It is suggested that this virtue is more apparent than real—first, in view of the total change in both theory and practice of constitutional government in the United States which would be required, and, second, in view of the fundamental problem which Watergate presented and which the Reuss proposal would not reach.

An alternative suggestion has been to make still greater use of the twenty-fifth amendment by implementing legislation, providing for the Vice President to become Acting President in the case of presidential disability. While admittedly the original concept of disability in the Kennedy-Johnson context was one of physical or mental condition, the language is general enough to admit of legal incapacity as well. Indeed, this was a specific alternative considered in the final weeks of the Nixon administration. It has ample precedent in the judicial disability and removal commissions which have been established in a number of states and would be compatible with the Ervin Committee’s proposal for a Public Attorney, as well as the pending bill to establish an Office of Congressional Legal Services.

Under the terms of such a bill, a nonpartisan commission of public persons would make an objective determination of the fact of presidential disability. When the disability was physical or mental, the commission would rely upon medical experts; when it was legal, the commission would proceed along the lines of the rules and procedures of the Ervin Committee or its successor proposed in S. 4227. Continuing review of the disability question would be provided, until it was resolved by removal, resignation, end of the term, or a finding that the disability itself had been terminated.

While such a proposal is essentially an invitation to an improved alternative, it does take advantage of the fact that the twenty-fifth amend-

131 Nixon Pardon, 154.
132 On Mar. 7, 1975, Senator Sam Nunn of Georgia introduced S. 1110, 94th Cong., 1st Sess. (1975), titled a Judicial Tenure Act, intended to provide procedures for retirement and removal of federal judges along lines similar to the disciplinary commissions of a number of states.
133 Supra note 73.
ment looked to the possibility of "such . . . body as Congress may by law provide." Its desirability in an age of chronic stress and constantly shifting emotional and material pressures requires little argument. Already the American people seem to be an age removed from the relatively uncomplicated problem of presidential succession which was the primary concern of the amendment in the beginning. If Watergate is indeed ultimately a question of how to preserve public morality in a complex political and economic environment, it would be unduly optimistic to assume that there will be no need for a legislative mechanism such as this in the future.

A Restatement of American Constitutional Theory

There is coincidence, if not symbolism, in the fact that the constitutional crisis of 1973-1974 occurred on the eve of the bicentennial of American independence. To paraphrase Tom Paine, political immorality, "like hell, is not easily conquered; yet we have this consolation with us, that the harder the conflict, the more glorious the triumph." The Republic experienced Watergate in an unparalleled era of international tensions, domestic depression, and social discontent. While pundits widely proclaimed that public opinion polls held government in low esteem, the fact is that the system remained stable, and the constitutional machinery, perhaps fortuitously, operated without stress or stalling.

This is not to say that the Constitution after Watergate will ever be the same. It has already received fundamental glosses on the nature of executive—as well as legislative and judicial—power. Unlike the vastly greater proportion of constitutional law, which concerns the powers of government in respect of interstate affairs, the Bill of Rights, and the fourteenth amendment, the cases decided in 1973-1974 concern the balancing of functions within government itself. These subjects have not undergone such thorough scrutiny since 1787, and recall Hamilton's opening phrase in The Federalist:

It has been frequently remarked, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force. If there be any truth in the remark, the crisis, at which we are

136 Cf. E. Cheseb, President Nixon's Psychiatric Profile (1973), ch. 4.
137 T. Paine, Common Sense.
arrived, may with propriety be regarded as the area in which that decision is to be made. . . .

The theory of separated powers, of checks and balances, as Hamilton and Madison understood, took account of the fact that temptation is ever present in positions of authority and responsibility. The separation of functions in the first three Articles of the Constitution was expected to prevent the concentration of all these functions into a single office. The checks and balances were intended to qualify and regulate even the functions vested in a particular office. The gradual accretion of adjective law relating to these offices was presumed to insure the working of the "interdependence" that Madison endorsed. It remains to be seen whether Watergate leaves a legacy of clarifying judicial guidelines and legislative remedy.

Item: The definition of executive discretion is now recognized as a judicial function, and its use is judicially reviewable.

Item:

A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. . . .

But this presumptive privilege must be considered in light of our historic commitment to the rule of law.

Item: The use of public or private funds to finance violations of election laws, fraudulent infiltration of election campaigns for espionage and sabotage purposes, and intentional misrepresentation of a candidate for elective office—already susceptible of liability under existing statutes—will presumably be made more explicit.

Item: The investigation and prosecution of wrongdoing in executive office is properly the function of a government office independent of both political branches. It may eventuate in the establishment of an office of Public Attorney.

Item: The twenty-fifth amendment anticipates that through implementing legislation, Congress may establish a commission on legal disability or incapacity in the President which can scrutinize objectively the

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139 Id., No. 48.
propriety of executive behavior and refer its findings to appropriate investigating authority.\textsuperscript{144}

These may be regarded as the actual and prospective constitutional results of Watergate. In evaluating them, it is appropriate to recall the comment of Senator Ervin, as relevant in 1776 as in the present: "Law is not self-executing. Unfortunately, at times its execution rests in the hands of those who are faithless to it. And even when its enforcement is committed to those who revere it, law merely deters some human beings from offending, and punishes other human beings for offending. It does not make men good."\textsuperscript{146}

\textsuperscript{144} Cf. Accountability, supra note 130, at 467-68.

\textsuperscript{146} Final Report (Watergate), at 1103.